FILE COPY

DEC 23 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

---

# No. 489

---

MARY MORTON WEST, Osage Allottee No. 192,
*Appellant,*

*vs.*

OKLAHOMA TAX COMMISSION

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

---

## STATEMENT AS TO JURISDICTION

---

Frank T. McCoy,
John T. Craig,
John B. Pearson,
Frank Mahan,
*Counsel for Appellant.*

# INDEX

## Subject Index


| | Page |
|---|---|
| Statement as to jurisdiction | 1 |
| Statement of the case and holding of Court | 1 |
| Opinions below | 3 |
| Date of judgment and of application for appeal | 4 |
| Cases believed to sustain jurisdiction | 4 |
| Statutory provision sustaining jurisdiction | 4 |
| State statute involved | 4 |
| Raising the Federal question | 6 |
| Statement of the grounds upon which it is contended that the questions involved are substantial | 11 |
| Exhibit "1"—Order of the Oklahoma Tax Commission | 13 |
| Exhibit "2"—Opinion of the Supreme Court of Oklahoma of June 18, 1946 | 15 |
| Exhibit "3"—Opinion of the Supreme Court of Oklahoma of — | 23 |


## Table of Cases Cited


| | |
|---|---|
| *Brooke* v. *City of Norfolk*, 277 U. S. 27, 72 L. Ed. 767 | 12 |
| *Choate* v. *Trapp*, 224 U. S. 665, 56 L. Ed. 941 | 4 |
| *Hoeper* v. *Tax Commission*, 284 U. S. 206, 76 L. Ed. 248 | 4, 12 |
| *Indian Motorcycle Co.* v. *United States*, 283 U. S. 570, 75 L. Ed. 1277 | 12 |
| *McCurdy* v. *United States*, 264 U. S. 484, 68 L. Ed. 801 | 11 |
| *May* v. *Heiner*, 281 U. S. 238, 74 L. Ed. 826 | 12 |
| *Oklahoma* v. *Barnsdall Refineries, Inc.*, 296 U. S. 521, 80 L. Ed. 366 | 11, 12 |
| *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, 87 L. Ed. 1612 | 11 |
| *Senior* v. *Braden*, 295 U. S. 422, 79 L. Ed. 1520 | 4 |

Page

*Standard Oil Company of California* v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611 ..... 4
*United States* v. *Allegheny County, Pa.*, 322 U. S. 174, 88 L. Ed. 1209 ..... 4
*United States* v. *Board of Com'rs.*, 145 F. (2d) 329 ... 11
*United States* v. *Rickert*, 188 U. S. 432, 47 L. Ed. 532 ..... 11
*United States* v. *Thurston County*, 143 Fed. 287 ..... 11

STATUTES CITED

Act of Congress approved June 28, 1906 (34 Stat. 539) ..... 11
Act of Congress approved March 3, 1921 (41 Stat. L. 1249) ..... 11
Act of Congress approved March 2, 1929 (45 Stat. 1478) ..... 11
Act of Congress approved June 24, 1938 (54 Stat. 1034) ..... 11
Judicial Code, Section 237(a), as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. 344(a) and 861(a)) ..... 4
Oklahoma Statutes of 1941, Title 68, Sections 988 to to 989t, inclusive ..... 4

# SUPREME COURT OF THE STATE OF OKLAHOMA

**No. 31948**

MARY MORTON WEST, OSAGE ALLOTTEE No. 192,
*Plaintiff in Error,*

*vs.*

OKLAHOMA TAX COMMISSION,
*Defendant in Error*

## STATEMENT AS TO JURISDICTION

### Statement of the Case and Holding of Court

This case originated before the Oklahoma Tax Commission, and involves the question of the includability for Oklahoma estate tax purposes of certain classes of property belonging to the estate of a deceased full blood restricted Osage Indian, Charles West, Jr., who died interstate September 2, 1940, while domiciled in and a resident of the State of Oklahoma. The classes of property involved are as follows:

1. 1 919/2520 Osage Indian mineral headrights, being deceased's right to share in the income from the Osage Tribal mineral estate, title to which is in the United States in trust for the Osage Tribe.
2. Stocks, bonds, and interest in mortgage purchased by and in the name of the United States from funds accumulated from Osage headrights.
3. Accruals from Osage headrights, held in trust by the United States.
4. Trust funds in the Treasury of the United States, being decedent's share in the proceeds of the sale of Osage tribal lands in Kansas.

The administrator of decedent's estate duly filed an estate tax return with the Oklahoma Tax Commission, and to the order of the Commission, entered September 20, 1943, assessing tax and penalty in the amount of $5,313.35, appellant filed her written protest. Summarized briefly, this protest presented the contention that the Oklahoma estate or inheritance tax statute, as applied by the Commission, was invalid because in conflict with and repugnant to the Constitution, treaties and laws of the United States as the same relate to the Osage Tribe of Indians and the members and estates of members of said tribe.

Thereafter the matter heard before the Oklahoma Tax Commission upon the protest filed and upon a stipulation of facts entered into by the parties showing the value of the estate and the character and value of the various items making up the same. After such hearing and on August 14, 1944, the Commission entered an order finding and adjudging that the estate should be assessed estate taxes in the amount of $4,263.15, but conditionally waiving penalty and interest. The amount of tax so assessed was arrived at by the inclusion in the gross estate of all classes of property of which the estate was composed, except the homestead. Exception to the order was taken and an appeal duly prosecuted by appellant to the Supreme Court of the State of Oklahoma by petition in error with case-made attached.

The petition in error specifically raised by way of various assigned errors, the defense that the Oklahoma inheritance or estate tax statute, as applied by the Oklahoma Tax Commission in this case, was and is invalid because in conflict with and repugnant to the Constitution, treaties and laws of the United States.

The case was briefed, argued and submitted to the Supreme Court of Oklahoma, with a companion case consolidated therewith, and on the 28th day of October, 1947, that Court handed down an opinion upholding the validity

of the statute as applied by the Commission, contrary to appellant's contentions regarding the Federal questions presented.

The Supreme Court of Oklahoma held that the title to the property involved is not in the United States, stating in the opinion that "We reject at once as untenable the assertion that the title to this property remained in the federal government under the various laws applicable to the Osages."

That Court further held that the properties in question "pass by law at death," contrary to the specific provisions of Osage Acts that such properties become the property of the individual members only at the expiration of the trust period.

## Opinions Below

The Oklahoma Tax Commission did not hand down an opinion, but merely entered an order assessing the tax, a copy of which order is attached hereto as Exhibit One. All of the proceedings before the Oklahoma Tax Commission are embodied in the case-made filed in the Supreme Court of Oklahoma and are contained in the transcript to this Court. The Supreme Court of Oklahoma first handed down an opinion in said cause on June 25, 1946, affirming the order and judgment of the Oklahoma Tax Commission, a copy of which opinion is hereto attached as Exhibit Two. Thereafter, and on October 28, 1947, after petition for rehearing was duly filed by appellant, said Supreme Court of Oklahoma withdrew and superseded said opinion of June 25, 1946, by a changed opinion which affirmed the order and judgment of said Oklahoma Tax Commission and made its effectiveness prospective only; that said opinion has not yet appeared in the official Oklahoma Reports, but a copy thereof is attached hereto as Exhibit Three.

**Date of Judgment and of Application for Appeal**

The opinion and judgment of the Supreme Court of Oklahoma, a copy of which is appended hereto as Exhibit Three, was handed down and rendered on the 28th day of October, 1947. The application for appeal was presented on the 24th day of November, 1947.

**Cases Believed to Sustain Jurisdiction**

The cases believed to sustain the jurisdiction of this Court are as follows:

*United States* v. *Allegheny County, Pa.*, 322 U. S. 174, 191, 88 L. Ed. 1209;

*Standard Oil Company of California* v. *Johnson*, 316 U. S. 481, 483, 86 L. Ed. 1611;

*Senior* v. *Braden*, 295 U. S. 422, 429, 79 L. Ed. 1520;

*Hoeper* v. *Tax Commission*, 284 U. S. 206, 213, 76 L. Ed. 248;

*Choate* v. *Trapp*, 224 U. S. 665, 56 L. Ed. 941.

**Statutory Provision Sustaining Jurisdiction**

The statutory provision believed to sustain the jurisdiction of this Court is section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C., secs. 344 (a) 861a).

**State Statute Involved**

The statute of the State of Oklahoma, the validity of which as applied is here involved, consists of Sections 988 to 989t, inclusive, Title 68, Oklahoma Statutes 1941, the provisions thereof pertinent to this appeal being as follows:

Section 989:

"A Tax, at the rates prescribed in Section 2 of this Act, is hereby levied upon the transfer of the net estate

of every decedent, whether in trust or otherwise, to persons, associations, corporations, or bodies politic, of property, real, personal, or mixed, whether tangible or intangible, or any interest therein or income therefrom, by will or the intestate laws of this State by any order setting apart property and/or granting family allowance pursuant to the probate code, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, whether made before or after the passage of this Act. * * *"

Section 989e:

"(A) The value of the gross estate used as a basis for the determination of the value of the net estate, shall be determined by including:

"(1) The value at the time of the death of the decedent of all property, real, personal, or mixed, whether tangible or intangible, of which the decedent died seized or possessed, within the jurisdiction of this State, and any interest therein or income therefrom, including the homestead in excess of Five Thousand ($5,000.00) Dollars, which shall pass to any person or persons, associations or corporations, in trust or otherwise, by testamentary disposition or by the laws of inheritance or succession of this or any other state or country."

Section 989i:

"Taxes levied under this Act shall be and remain a lien upon all the property transferred until paid, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of administration, allowed by the court having jurisdiction thereof, shall be divested of such lien. * * *"

**Raising the Federal Question**

The Federal question was first raised by written protest filed in the tribunal where the case originated. The portions of the protest specifically raising Federal questions are as follows:

1. "1. That the statute of the State of Oklahoma, to-wit: Sections 988 to 989t, Title 68, Oklahoma Statutes 1941, under which said assessment was made and entered and as applied by your Honorable Commission to the estate and the property thereof of said decedent, is invalid for the reason that the same is in conflict with and repugnant to the Constitution, treaties and laws of the United States as the same relate to and affect the property of said decedent, this protestant and the Osage Tribe of Indians and the members and estates of members of said tribe.

2. "2. That said assessment is invalid for the reason that this protestant claims immunity of the estate of the said Charles West, Jr., and of each and every item of property composing said estate, as hereinafter set out, from taxation under said statute, by virtue of the provisions of the Constitution, treaties and laws of the United States as the same relate to and affect the property of said decedent, this protestant and the Osage Tribe of Indians and the members and the estates of members of said tribe.

* * * * * * *

3. "4. The assessment of the property of the estate of said decedent is in conflict with the decision of the Supreme Court of the State of Oklahoma, in the case of Childers *v.* Pope, 119 Okl. 300, 249, P. 726.

4. "5. Protest is specifically made against the assessment upon the following items:

"A. Upon the value of $24,294.55, representing the items set forth in Schedules A-1 and A-2 of the return filed herein by the administrator. This sum includes the value of 1 and 919/2520ths Osage headrights owned

by the decedent at the time of his death, which headrights represent an undivided interest in the oil, gas, coal and other minerals under all the lands in Osage County, Oklahoma, which interest was reserved to the Osage Tribe of Indians by Act of Congress approved June 28, 1906 (34 Stat. L. 539), and all of which is a trust duly established by the United States for the benefit of the said Osage Tribe of Indians and heirs of the members of said tribe, which has never been subjected to state taxation. The headrights in this case are valued at $10,235.12. Your protestant shows that the remaining value in this particular schedule of $14,059.43 is not includable in the net estate; it was land purchased for the decedent by the use of restricted trust funds which had accumulated to the credit of the decedent from his headright; the remainder of said real estate was inherited by said decedent from various full blood restricted ancestors, including Osage restricted homestead, which was not and is not subject to state taxation.

"B. Upon the inclusion in the net estate of the sum of $73,505.80 set forth in Schedule B under the item of stocks and bonds; said stocks and bonds were purchased by and in the name of the United States and are still so held for said decedent in the exercise of the authority vested in the Secretary of the Interior by Acts of Congress, the purchases having been made from funds accumulated from the aforementioned Osage headrights; said funds and said stocks and bonds at all times since the acquisition thereof having been held by the Secretary of the Interior and never subjected to state taxation.

"C. Upon the inclusion in the net estate of property set forth in Schedule C in the amount of $34,926.69, (a) cash, $29,445.17, which represents the accruals from the Osage headright payments as aforementioned, (b) $736.00 represents certain items of personal property which were purchased with funds accruing to the Osage headrights, and (c) the remainder of $4,745.52 represents the trust funds in the hands of the Treas-

urer of the United States, being decedent's share in the proceeds of the sale of the Osage Tribe's lands in Kansas, and which were credited to each Osage Indian, which have never been subjected to state taxation.

"That under the express provisions of the Act of Congress approved March 2, 1929, (45 Stat. 1478) each and all of the aforesaid items of property belonging to said estate have heretofore been held and still continue to be held in trust by and subject to the supervision of the United States.

5. "6. No authority has ever been granted by the Congress of the United States to the State of Oklahoma to levy a tax upon the transfer of property owned by deceased Osage Indians."

On appeal from the order of the Oklahoma Tax Commission assessing the tax the Federal questions were again raised in the form of the following errors assigned in the petition in error filed in the Supreme Court of the State of Oklahoma:

1. That no tax is due under the decision of the Supreme Court of Oklahoma in the case of Childers *v.* Pope, 119 Okl. 300, 249 Pac. 726, or at least not the amount assessed.

2. That the statute of the State of Oklahoma to-wit: Sections 988 to 989t, inclusive, Title 68 Oklahoma Statutes 1941, under which said order of assessment was made, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in the making of said assessment and order, violates the 14th Amendment to the Constitution of the United States by imposing an estate tax on this estate or a part thereof which is constitutionally immune therefrom, and abridges and denies this protestant's privileges and immunities guaranteed to her by the Constitution of the United States, the Osage treaties and laws, and deprives her of her property without due process of law and denies to her the equal protection of the law.

3. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, in violation of the 14th Amendment to the Constitution of the United States, Osage treaties and laws, imposes an inheritance and transfer tax which includes in its measure property which protestant does not receive, to-wit: (a) the value of the corpus of the undivided portion of the minerals in and under Osage County held by the United States in trust for the Osage Tribe of Indians, from which decedent during his life was permitted to receive a part of the income: (b) the value of a portion of the Osage Trust Fund determined and held by the United States, from which the decedent during his life was permitted to receive a part of the interest thereon; (c) a fractional part of the money from Osage tribal minerals received and held in trust by the United States for the Osage Tribe after payment therefrom to the decedent during his lifetime of certain annuities as provided by law.

4. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, in violation of the Constitution of the United States, Osage treaties and laws, imposes on protestant an inheritance and transfer tax which includes in its measure property of the United States and property held by the United States in trust for the Osage Tribe of Indians in which decedent and this protestant had and have no individual vested property interest.

5. That said state statute, and said statute as applied and enforced to protestant's disadavantage by said Oklahoma Tax Commission in this case, contrary to the 14th Amendment to the Constitution of the United States, Osage treaties and laws, imposes on protestant an inheritance and transfer tax which includes in its measure property held in trust by the United States long prior to the admission of the State of Oklahoma into the Union and the enactment of its first inheritance and estate tax law, and under which

trust no transfer thereof took place upon the death of decedent.

6. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, would interfere with and defeat the United States in performing its governmental duty to the Osage Tribe of Indians, including this protestant, and diminish the trust estate, contrary to Osage treaties and laws, which trust estate is to be delivered by the trustees to the remainder-men in 1983.

7. That the title to part of said property included in the measure of said tax is in the United States and is constitutionally immune from state taxation.

8. That if any property right passed at the death of the decedent to this protestant, it did so by virtue of the federal law and not by state law.

9. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, violates the rights of protestant and of the United States under Section 8 of Article 1 of the Constitution of the United States relating to commerce with the Indian Tribes.

10. That said state statute, and said statute as applied and enforced to protestant's disadvantage by said Oklahoma Tax Commission in this case, violates Section 1 of the Enabling Act (34 Stat. L. 267-278) of the State of Oklahoma.

11. That by reason of Constitutional immunity, said minerals, trust fund and proceeds from said minerals held by the United States in trust for the Osage Tribe have never been subjected to state taxation.

12. That Congress has never granted authority to the State of Oklahoma to levy a tax upon the transfer of property held in trust by the United States for the Osage Tribe of Indians.

**Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial**

1. The decision and judgment of the Supreme Court of Oklahoma and the application of the inheritance or estate tax statute in question, being Sections 988 to 989t, inclusive, Title 68, Oklahoma statutes 1941, to property the title to which is in the United States in trust for Indians are in direct conflict with former decisions of this Court and of Federal District Courts and Circuit Courts of Appeals in similar cases. *United States* v. *Rickert,* 188 U. S. 432, 47 L. Ed. 532; *McCurdy* v. *United States,* 264 U. S. 484, 68 L. Ed. 801; *Oklahoma* v. *Barnsdall Refineries, Inc.,* 296 U. S. 521, 80 L. Ed. 366; *United States* v. *Thurston County,* 143 F. 287; *United States* v. *Board of Com'rs,* 145 F. (2d) 329.

The case of *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598, 87 L. Ed. 1612, does not either expressly or impliedly overrule the above cases and does not govern this case, since in that case title to the property involved was in the individual Indian, rather than in the United States, and all minerals produced from the Indian's land had been by Act of Congress made subject to all State and Federal taxes.

2. The United States government holds the property involved under a trust established by Acts of Congress imposing upon the government the duty to deliver the *corpus* of the trust property to the individual members of the Osage Tribe at the end of the trust period, already extended by successive Acts of Congress to 1983 and 1984. Act of Congress approved June 28, 1906 (34 Stat. 539); Act of Congress approved March 3, 1921 (41 Stat. L. 1249); Act of Congress approved March 2, 1929 (45 Stat. 1478); Act of Congress approved June 24, 1938 (54 Stat. 1034). The exaction of the tax in question would interfere with such governmental duty and diminish the trust estate.

3. Under the provisions of the Acts of Congress above cited the *corpus* of the trust property does not become the property of the individual member of the Osage Tribe until the termination of the trust period, already extended by Congress on the tribal mineral interest to April 8, 1983, and on the moneys and other properties held in trust until January 1, 1984. To impose upon the estate of the decedent an inheritance or estate tax which includes in its measure property which was not the property of the decedent at the time of his death would constitute a denial of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. *Brooke* v. *City of Norfolk,* 277, U. S. 27, 72 L. Ed. 767; *May* v. *Heiner,* 281 U. S. 238, 74 L. Ed. 826; *Hoeper* v. *Tax Commission,* 284 U. S. 206, 215, 76 L. Ed. 248.

4. The immunity from state taxation of property held in trust by the United States for Osage Indians which inheres in the principle that "the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states" has never been withdrawn by Congress. *Oklahoma* v. *Barnsdall Refineries, Inc.,* 296 U. S. 521, 80 L. Ed. 366; *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570, 575, 75 L. Ed. 1277.

## Conclusion

It is respectfully submitted that for the reasons given this Court has jurisdiction of the appeal.

Dated November 24, 1947.

Respectfully submitted,

FRANK T. MCCOY,
JOHN T. CRAIG,
JOHN R. PEARSON,
FRANK MAHAN,
*Counsel for Plaintiff in Error.*

## EXHIBIT "1"

## BEFORE THE OKLAHOMA TAX COMMISSION

No. 1743

In the Matter of the Assessment of Estate Taxes Against Charles West, Jr., Deceased

Order No. 17,874

This cause coming on for hearing before the Oklahoma Tax Commission on the 14th day of July, 1944, the Commission being present by the Chairman J. Frank Martin and J. D. Dunn, Vice-Chairman; protestant appearing by its attorneys, Frank T. McCoy of Pawhuska, Oklahoma, and Frank Mahan of Fairfax, Oklahoma; and the Oklahoma Tax Commission appearing by Walter Harris, Director of the Inheritance and Estate Tax Division, and the Commission being represented by E. L. Mitchell, A. L. Herr and C. W. King of the Legal Division, said Commission, after hearing the protest of the taxpayer and after having examined the returns of the taxpayer, the appraisement of the estate and property and assets of the said estate of Charles West, Jr., deceased, and after considering all of the evidence in the case takes said case under advisement; thereafter and on the 14 day of August, 1944, said Commission finds that each and all of the items mentioned in the stipulation of facts, have and except the inherited tax exempt Osage homestead, should be included in this gross estate and taxed under the Oklahoma inheritance, transfer and estate tax statutes, Title 68, Section 989, (a) to (t) inclusive, O. S. 1941.

That there is due as transfer, inheritance and estate taxes from the estate of the said Charles West, Jr., deceased the amount of $4,263.15 and interest at the rate of 1 per cent per month thereon from the 2nd day of December, 1941.

It is the judgment and opinion of the Commission that if the amount of tax finally decreed to be due the State of Oklahoma from this estate shall be paid within 30 days from the recording of the mandate of the court in case of appeal, from this order, that no interest or penalty should be charged.

It is, therefore, ordered, adjudged and decreed, by the Oklahoma Tax Commission that transfer, inheritance and estate taxes in the amount of $4,263.15 is hereby assessed against the said estate of Charles West, Jr., deceased, and ordered to be paid to the Oklahoma Tax Commission by the said estate; that if said tax is paid within 30 days from the final judgment of the Commission or the recording of the mandate of the court in case of appeal, then no interest or penalty shall be assessed or collected; that if said tax is not paid within said time, there shall be paid the additional amount due as interest at the date of 1 per cent per month from the 2nd day of December, 1941, to date of final payment.

Exception to this order having been taken by the taxpayer and notice of appeal to the Supreme Court of Oklahoma from this judgment and order of assessment having been given, this judgment and order shall be held in abeyance and shall be nonoperative for a period of 30 days from date, and if appeal shall have been perfected to the Supreme Court of the State of Oklahoma within said time, then said judgment shall be further held in abeyance until the final determination of the controversy by the court of last resort to which said cause shall be appealed.

Dated this 14 day of August, 1944.

OKLAHOMA TAX COMMISSION,
By J. FRANK MARTIN,
*Chairman,*
J. D. DUNN,
*Vice-Chairman,*
R. H. SIBLEY,
*Member.*

Attest:

H. D. CANFIELD,
(Seal) *Secretary.*

Approved:

FRANK T. McCOY,
*Attorney for Taxpayer.*
C. W. KING,
*Attorney for the*
*Oklahoma Tax Commission.*

## EXHIBIT "2"

Filed in Supreme Court of Oklahoma, Jun. 18, 1946, Andy Payne, Clerk.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 31947

FLOYD O. YARBROUGH, Executor of Estate of Dora Neal Rector, Deceased, *Plaintiff in Error,*

*vs.*

OKLAHOMA TAX COMMISSION, *Defendant in Error,*

and

MARY WEST, *Plaintiff in Error,*

*vs.*

OKLAHOMA TAX COMMISSION, *Defendant in Error*

No. 31948

SYLLABUS

The estates of deceased, fullblood, restricted, Osage Indians, except the allotted homestead, are subject to the estate, or transfer, or inheritance tax levied by the State of Oklahoma under the provisions of 68 O. S. 1941, secs. 988 et seq.

Appeal from the Oklahoma Tax Commission
Affirmed

Frank T. McCoy, John T. Craig, John R. Pearson, Pawhuska, Oklahoma; Frank Mahan, Fairfax, Oklahoma, for Plaintiffs in Error.

E. L. Mitchell, C. W. King, Oklahoma City, Oklahoma, for Defendant in Error.

BAYLESS, *J.:*

This appeal from the Oklahoma Tax Commission involves only the issue of the power of the State of Oklahoma to levy and collect an estate, transfer, and inheritance tax under

68 O. S. 1941, secs. 988 et seq., in the estate of Dora Neal Rector, deceased, who was a fullblood, allotted restricted Osage Indian. This person died leaving an estate consisting of (1) allotted homestead land; (2) allotted surplus land and land inherited from other Osages; (3) 2 and 13/252nds Osage Mineral Headright interests; (4) cash in the hands of the United States Treasurer derived from the income from the headright interests; and (5) cash in the hands of the United States Treasurer representing her share of the sale price of tribal lands in Kansas. It is conceded the allotted homestead is non-taxable and the Commission made no order taxing it under the above statute. The executor of Rector's estate appeals. There is a similar appeal on the identical issue by the representative of the estate of Charles West, Jr., a deceased minor, unallotted Osage Indian, whose estate consisted of (1) 1 and 919/2520ths Osage Mineral Headright interests; (2) land purchased with funds derived from the headright interests and land inherited from other Osages; (3) cash in the hands of the United States Treasurer representing accruals of income from the headright interests; (4) personal property purchased with funds derived from the headright interests; and (5) cash in the hands of the United States Treasurer representing his share of the sale price of tribal lands in Kansas. These appeals are consolidated for presentation to us and decision. In addition to the briefs of the parties, briefs amicus curiae have been filed.

The methods of stating and treating the various law issues differ in these briefs, but essentially they all coincide on certain issues that determine the controversy. We shall treat these issues in an arrangement that tends to our convenience but does not overlook any aspect of the vital issues raised.

Before directing our attention to the specific issues argued, we will discuss an aspect of these cases that inheres in the position of appellants and is an assumption that underlies virtually all of their arguments. It is both asserted and implied that there is no reason, and there should be no disposition on the part of this court, to delve into this issue again. Briefly the main issue can be stated thus: No tax is due under an earlier decision of this court. See Childers

*v.* Pope, 119 Okl. 300, 249 P. 726. In that case it was held that the portion of the estate of a restricted Indian consisting of land and mineral interests was not taxable under Oklahoma law. However, this holding was not original with this court; there is no language in it that manifests a concurrence in the rationale of the rule adopted, and it is obvious the opinion was forcedly adopted by the controlling circumstance of an intervening opinion by the Supreme Court of the United States. See Childers *v.* Beaver, 270 U. S. 555, 70 L. Ed. 730 (7). It will be observed in reading the Childers *v.* Pope opinion that this court remarked it was "not disposed to go further than the rule therein announced.", (Beaver, supra), and expressly made subject to Oklahoma's taxing power, as an exception to the rule of the Beaver case, the personal property of the estate. The Beaver decision, as it related to land and mineral interests, was based on two grounds: (1) Such property descended by federal and not state law, and (2) The restrictions under which the federal government held some of the property of all Indians and all of the property of some Indians constitute a federal instrumentality that would be interfered with if subjected to state taxation. One of the best of reasons for again going into this issue, since our independent judgment was obstructed earlier, is the recent review and revision by the Supreme Court of the United States of the rules of law of the earlier federal decisions on this branch of the law. The traditional federal court view of the nontaxability of the property of Indians is illustrated by U. S. *v.* Rickert, 188 U. S. 432, 47 Law Ed. 532 and Childers *v.* Beaver, supra. The alteration in this view is disclosed by Shaw *v.* Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 Law Ed. 709; Supt. etc. v. Comm. Int. Rev., 295 U. S. 418, 79 Law Ed. 1517; U. S. *v.* Oklahoma Tax Commission, 131 Fed. (2) 635: Helvering *v.* Mountain Producers Corp., 303 U. S. 376, 82 Law Ed. 907; Oklahoma Tax Commission *v.* U. S., 319 U. S. 598, 87 Law Ed. 1612, and the various decisions discussed therein. It is not an unfair summary of the two views to say that earlier the federal court decisions provided an almost complete immunity from taxation in any form where it appeared that any degree of wardship was exercised by the federal government toward the Indian (and

too frequently this immunity was spread over non-Indians in their contractural relations with Indian property), whereas, lately the Indians' immunity from taxation is not implied but must be rested upon some plain base, and it no longer spreads over their contractual privies. In reviewing the earlier decisions on the so-called "federal instrumentality" rule, the Supreme Court of the United States stated (Helvering *v.* Mountain Producers Corp., supra), "In the light of the expanding needs of State and Nation, the inquiry has been pressed whether this conclusion has adequate basis; * * * and the distinctions thus maintained have attenuated its teaching and raised grave doubt as to whether it should longer be supported,". In Oklahoma Tax Commission *v.* U. S., Supra, it was stated the instrumentality rule announced in the Beaver case, supra, "was in effect overruled." Thus if the Beaver opinion stood on no other basis than the instrumentality rule, it would no longer bar the State of Oklahoma in its effort to collect the tax involved. This alteration is sufficient justification for the State's renewed effort, an effort regarded as serious and persistent in the opinion in Oklahoma Tax Commission *v.* U. S., supra.

Previously we mentioned that the Beaver opinion stated, in addition to the instrumentality rule, another reason why the State of Oklahoma could not levy and collect the tax involved and this other reason is also urged against the State, with great stress, in the briefs. In short, as said in that opinion, "Apparently appellan*d* supposed that the land passed to the heirs by virtue of the laws of the State and were subject to the inheritance taxes which she laid. * * * The land really passed under a law of the United States, and not by Oklahoma's permission." Adopting this language and the language of the various Osage Acts and the decisions of the courts on a variety of issues arising thereunder, as well as other Indian laws, it is urged (1) that no title to this property ever vested in the Osages but the title remains yet in the Federal government and thus is no taxable, or (2) if title actually vested in the individual Osages, the devolution thereof is by virtue of Federal and not State law, thus depriving Oklahoma of the power to tax

the transitus of this property from the Osage Indian to his heir or devisee.

We reject at once as untenable the assertion that the title to this property remained in the Federal government under the various laws applicable to the Osages. Globe Indemnity Co. *v.* Bruce, 81 Fed. (2d) 143, and In re Martin's Estate, 183 Okl. 177, 80 P. 2d 561. It will not serve any purpose useful to a decision in this matter to undertake to determine precisely what aspect of title remained in the Federal government or was assumed by it as an instrumentality to further its supervision of and duty toward Osage Indians under the restrictive terms of the allotment laws and subsequent laws. The case of Oklahoma Tax Commission *v.* U. S., supra, definitely establishes the rule that the levying of a tax such as this on the devolution of property similarly affected does not interfere with the Federal government. There is a distinct difference between the situation of Osage Indians and their property, under the Acts applicable to them, and the allottee and the property involved in U. S. *v.* Rickert, 188 U. S. 432, 47 Law Ed. 532, as is pointed out in Oklahoma Tax Commission *v.* U. S., supra, Osage Indians are full citizens of the State of Oklahoma. Osage Indians have title to their allotments, to their aliquot parts of the mineral headright interests, and land sale trusts, and the accumulations from these sources in the Federal treasury. These properties are identifiable, subject to Constitutional and statutory protection, derive benefits for their owners, and pass by law at death. The title, if such it may be called, that rests in the Federal government is a mere instrument for service, whereas the title in the Indians is an individual, beneficial, and valuable thing.

We accept as final and binding upon us the rule in the Beaver case, above, that devolution of this property is by Federal and not State law. However, we cannot accept as logical the rule that because this is so, Oklahoma has no power to tax the transitus, either as an incident or with respect to the rights co-incident therewith or arising therefrom. It is pointed out by the State that the Federal government levies an inheritance tax on non-Indian citizens of Oklahoma although the devolution and transitus are by

virtue of Oklahoma law. It is generally recognized that the Federal Constitution is the supreme law of the land, and within the Federal field, Federal statutes control and no State authority exists or can intrude, and likewise for the State Constitution and its statutes. No one would contend that Federal authority exists to direct or interfere with Oklahoma's power to legislate on descent and distribution with respect to non-Indian citizens. Oklahoma may permit or forbid the devising or inheriting of property within its borders; it may permit succession on such terms as it chooses, and by what system. No Federal control may apply. If it is this power that gives rise to the right to levy an inheritance or succession tax, as indicated in the Beaver opinion, it may, with some degree of logic be asked by what authority does the Federal government tax our citizens in such instances?

Reconsideration of this problem caused the Supreme Court of the United States to say, in Oklahoma Tax Commission *v.* U. S., above:

> "It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward the Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of the Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. Superintendent of Five Civilized Tribes *v.* Commissioner of Internal Revenue, supra (295 U. S. 421, 79 Law Ed. 1520, 55 S. Ct. 820). 'Wardship with limited power over his property' did not there 'without more render (the Indian) immune from the common burden'. A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the

United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman *v.* Commissioner of Internal Revenue (CCA 10th) 123 F. (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes. "Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more."

All of this is summed up in that opinion in these words: "Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism."

In that opinion reference was made to the fact the federal government is collecting from Indian wards an income tax and an estate tax. In this appeal, our attention has been called to the fact that the federal government collects an estate tax on Osage estates. The Treasury Department's act in collecting such tax is based upon (1) the nature of the title of the Osage Indian and (2) the power of the Osage Indian to pass this property at his death. There is nothing in any of the decisions called to our attention that indicates that a power to levy an estate tax in the case of its Indian wards that is not possessed by the State of Oklahoma. As we understand the rule of immunity from taxation by reason of the wardship exercised by the federal government over Indians, including restrictions on alienation, it means a lack of power in either government to tax, not simply that the federal government has such power and Oklahoma has not.

If the title to this property yet remains in the federal government, as contended by appellants, that government certainly would not tax its own property. Yet the record and decisions disclose that the federal government does exact an estate tax in these and similar instances. If the federal government does not regard its position as guardian

of the Indians as a bar to its exacting income and estate taxes from the Indians, it is a reasonable assumption that it does not look upon the protective restrictions placed around the Indians' property as affording tax immunity. The Supreme Court of the United States said in Oklahoma Tax Commission *v.* U. S., above, in referring to earlier federal court decisions establishing and extending tax immunity in favor of the Indian and his privies: "None of these cases hold, nor has this court ever decided, that congressional restriction of an Indian's income carried an implication of estate Tax exemption. * * * The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. * * * If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all of its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. 'Non-taxability and restrictions upon alienation are distinct things.' "

While this last cited and quoted case involved the estates of Creek Indians whose allotments and restrictions on alienation and the management of property rest on different laws, the general tone of the court's language in that decision clearly support the Oklahoma Tax Commission in this case.

The Order of the Oklahoma Tax Commission is affirmed.

Concur: Riley, Osborn, Welch, Corn, and Davison, JJ.
Dissent: Hurst, V.C.J.

**EXHIBIT "3"**

## IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 31947

FLOYD O. YARBROUGH, Executor of Estate of Dora Neal Rector, Deceased, *Plaintiff in error*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error*

and

No. 31948

MARY WEST, *Plaintiff in Error*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error*

### SYLLABUS

1. The estates of deceased full-blood, restricted Osage Indians, except the allotted homestead, are subject to the estate, or transfer, or inheritance tax levied by the State of Oklahoma under the provisions of 68 O. S. 1941, Sec. 988 et seq.,

2. Our former decision in the case of In re Estate of Nah-Me-Tse-He Childers *v.* Pope, 119 Okla. 300. 249 Pac. 726, is hereby expressly overruled in so far as that decision announces the rule that all of the estate of a deceased Osage Indian is exempt from the estate or inheritance tax authorized and levied by this state. The overruling of such decision subject however to the following provisions of prospective application only as to assessment and collection of such tax on other estates to the extent stated in the opinion.

3. A court of final decision, in overruling a prior adopted principle established by its own earlier decisions, may ordinarily in its discretion preserve in the overruling opinion all rights accrued under the prior declaration, the same

as if they had been created or arose out of a former existing statute later repealed by the Legislature.

4. This opinion shall operate prospectively only as to assessment and taxation of property of other estates affected hereby in the manner stated in the body of the opinion and for the reasons therein stated.

Appeal from the Oklahoma Tax Commission by Floyd O. Yarbrough, executor of estate of Dora Neal Rector, deceased, and by Mary West. Appeals consolidated.

Affirmed.

Frank T. McCoy, John T. Craig, and John R. Pearson, all of Pawhuska, and Frank Mahan of Fairfax, Oklahoma, For Plaintiffs in Error.

E. L. Mitchell and C. W. King, both of Oklahoma City, Okla., For Defendant in Error.

BAYLESS, J.:

These appeals from the Oklahoma Tax Commission involve only the issue of the power of the State of Oklahoma to levy and collect an estate, transfer, and inheritance tax under 68 O. S. 1941, Sec. 988, et seq. on the estates involved. Dora Neal Rector, a full-blood, allotted, restricted Osage Indian, died leaving an estate consisting of (1) allotted homestead land; (2) allotted surplus land and land inherited from other Osages; (3) 2 and 13/252nds Osage mineral headright interests; (4) cash in the hands of the United States Treasurer derived from the income from the headright interest; and (5) cash in the hands of the United States Treasurer representing her share of the sale price of tribal lands in Kansas. It is conceded the allotted homestead is nontaxable and the Commission made no order taxing it under the above statute. Charles West, Jr., a deceased minor, unallotted Osage Indian, left an estate consisting of (1) 1 and 919/2520ths Osage mineral headright interests; (2) land purchased with funds derived from the headright interests and land inherited from other Osages; (3) cash in the hands of the United States Treasurer representing accruals of income from the headright interests; (4) personal property purchased with funds derived from the headright interests; and (5) cash in the

hands of the United States Treasurer representing his share of the sale price of tribal lands in Kansas. These appeals are consolidated for presentation to us and decision. In addition to the briefs of the parties, briefs amicus curiae have been filed.

Before directing our attention to the specific issues argued, we will discuss an aspect of these cases that inheres in the position of appellant and is an assumption that underlies virtually all of their arguments. It is both asserted and implied that there is no reason, and there should be no disposition on the part of this court, to delve into this issue again. Briefly the main issue can be stated thus: No tax is due under an earlier decision of this court, to-wit: Childers *v.* Pope, 119 Okla. 300, 249 Pac. 726.

In that case it was held that the portion of the estate of a restricted Indian consisting of land and mineral interests was not taxable under Oklahoma law. However, this holding was not original with this court; there is no language in it that manifests a concurrence in the rationale of the rule adopted, and it is obvious the opinion was forcedly adopted by the controlling circumstance of an intervening opinion by the Supreme Court of the United States, to-wit: Childers *v.* Beaver, 270 U. S. 555, 70 L. ed. 730 (7). It will be observed in reading the Childers *v.* Pope opinion that the decision there was based solely on the rule of the Beaver case, supra, and in the Pope case this court remarked it was "not disposed to go further than the rule therein announced." (Beaver, supra), and expressly made subject to Oklahoma's taxing power, as, an exception to the rule of the Beaver case, the personal property of the estate.

One of the best of reasons for again going into this issue, since our independent judgment was obstructed earlier, is the recent review and revision by the Supreme Court of the United States of some of the rules of law of the earlier federal decisions on this branch of the law. The traditional federal court view of the nontaxability of the property of Indians is illustrated by United States *v.* Rickert, 188 U. S. 432, 47 L. ed. 532, and Childers *v.* Beaver, supra. The alteration in this view is disclosed by Shaw *v.*

Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 L. ed. 709; Supt. etc., *v.* Comm. Int. Rev. 295 U. S. 418, 79 L. ed. 1517; United States *v.* Oklahoma Tax Commission, 131 Fed. 2d 635; Helvering *v.* Mountain Producers Corp., 303 U. S. 376; 82 L. ed. 907; Oklahoma Tax Commission *v.* United States, 319 U. S. 598, 87 L. ed. 1612, and the various decisions discussed therein.

In Oklahoma Tax Commission *v.* United States supra, it was stated: "Childers *v.* Beaver, 270 U. S. 555, 70 L. Ed. 730, 46 S. Ct. 387, supra, was in effect overruled by the Mountain Producers Corp., decision." This alteration is sufficient justification for the state's renewed effort, an effort regarded as serious and persistent in the opinion in Oklahoma Tax Commission *v.* United States, supra.

We reject at once as untenable the assertion that the title to this property remained in the federal government under the various laws applicable to the Osages. Globe Indemnity Co. *v.* Bruce, 81 Fed. 2d 143, and In re Martin's Estate, 183 Okla. 177, 80 P. 2d 561. It will not serve any purpose useful to a decision in this matter to undertake to determine precisely what aspect of title remained in the federal government or was assumed by it as an instrumentality to further its supervision of and duty toward Osage Indians under the restrictive terms of the allotment laws and subsequent laws. The case of Oklahoma Tax Commission *v.* United States, supra, definitely establishes the rule that the levying of a tax such as this on the devolution of property similarly affected does not interfere with the federal government. There is a distinct difference between the situation of Osage Indians and their property, under the acts applicable to them, and the allottee and the property involved in United States *v.* Rickert, 188 U. S. 432, 47 L. ed. 532, as is pointed out in Oklahoma Tax Commission *v.* United States, supra. Osage Indians are full citizens of the State of Oklahoma. Osage Indians have title to their allotments, to their aliquot parts of the mineral headright interests, and land sale trusts, and the accumulations from these sources in federal treasury. These properties are identifiable, subject to constitutional and statutory protection, derive benefits for their owners, and pass by law at death. The title, if such it may be called, that rests in the

federal government is a mere instrument for service, whereas the title in the Indians is an individual, beneficial, and valuable thing.

The Supreme Court of the United States said in Oklahoma Tax Commission *v.* United States, supra:

> "It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward the Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of the Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. Superintendent of Five Civilized Tribes *v.* Commissioner of Internal Revenue, supra (295 U. S. 421, 79 L. ed. 1520, 55 S. Ct. 820). 'Wardship with limited power over his property' did not there 'Without more render (the Indian) immune from the common burden.' A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman *vs.* Commissioner of Internal Revenue (C. C. A. 10th) 123 F. 2d 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.
>
> "Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more."

All of this is summed up in that opinion in these words:

"Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism."

In that opinion reference was made to the fact the federal government is collecting from Indian wards an income tax and an estate tax. In this appeal our attention has been called to the fact that the federal government collects an estate tax on Osage estates. The Treasury Department's act in collecting such tax is based upon (1) the nature of the title of the Osage Indian, and (2) the power of the Osage Indian to pass this property at his death. There is nothing in any of the decisions called to our attention that indicates that the United States government has a power to levy an estate tax in the case of its Indian wards that is not possessed by the State of Oklahoma. As we understand the rule of immunity from taxation by reason of the wardship exercised by the federal government over Indians, including restrictions on alienation, it means a lack of power in either government to tax, not simply that the federal government has such power and Oklahoma has not.

If the title to this property yet remains in the federal government, as contended by appellants, that government certainly would not tax its own property. Yet the record and decisions disclose that the federal government does exact an estate tax in these and similar instances. If the federal government does not regard its position as guardian of the Indians as a bar to its exacting income and estate taxes from the Indians, it is a reasonable assumption that it does not look upon the protective restrictions placed around the Indians' property as affording tax immunity. The Supreme Court of the United States said in Oklahoma Tax Commission *v.* United States, above, in referring to earlier federal court decisions establishing and extending tax immunity in favor of the Indian and his privies:

"None of these cases held, nor has this court ever decided, that congressional restriction of an Indian's

income carried an implication of estate tax exemption. * * * The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. * * * If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all of its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. 'Non-taxability and restrictions upon alienation are distinct things.' "

While this last-cited and quoted case involved the estates Creek Indians whose allotments and restrictions on enation and the management of property rests on dif- ent laws, the general tone of the court's language in that ision clearly supports the Oklahoma Tax Commission his case.

Since our former decision in Childers *v.* Pope, supra, was ed solely upon a following of the rule of Childers *v.* aver, supra, and since the Supreme Court of the United tes in reviewing various former decisions has itself "in ct overruled" Childers *v.* Beaver, we are at liberty to art from following it.

We conclude that the order of the Oklahoma Tax Commis- n should be affirmed, and this tax assessed against these ates to the extent heretofore stated.

The pronouncement of this rule and the overruling of lders *v.* Pope, supra, constitutes a definite change in application of this tax to certain property of estates. e result is that under this decision certain property of ates will be subject to this tax which under the former struction was not so taxable, and it is urged that we uld restrict this rule change to prospective effect only to other estates administered upon and closed prior to effective date of this decision. Upon that point, we erve that the rule of our former decision, following lders *v.* Beaver, was established in 1926, and under that e of non-liability of such estates to the tax here involved, s a matter of common knowledge, as well as judicial wledge that many estates have been administered upon l closed and titles vested with no thought that any such

tax liability existed and without any demand for or effort to collect such a tax; and that the stability of titles might be grievously affected unless we set at rest, or permit to remain at rest, any question as to the liability of any such estates for any such tax.

It is suggested on the part of the Tax Commission that no intention exists to undertake to surmount the apparent difficulties and to seek to apply this rule of taxability to such estates heretofore closed. We fully agree with the thought that no such effort should be made, and to that end, and for the reasons stated, we deem it our duty, and clearly within our authority, to give the aforesaid prospective effect only to this change in such rule. See Oklahoma County *v.* Queen City Lodge No. 197, I. O. O. F. 195, Okla. 131, 156, Pac. (2d) 340, and the many authorities therein cited.

It is therefore adjudged that this rule change is adopted for only prospective application to other estates so as not to apply to other estates administered upon and closed prior to the date of this opinion. For the reasons stated, and upon the consideration and conditions stated, the order of the Tax Commission is affirmed.

Davison, V.C.J., Bayless, Welch, Arnold and Luttrell, JJ: concur.

Riley, and Corn, JJ: concur in part and dissent in part, as to Prospective Operation Only.

Hurst, C. J., and Gibson, J., Dissent.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 31947

FLOYD O. YARBROUGH, EXR., et al., *Plaintiffs in Error,*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error.*

No. 31948

MARY MORTON WEST, Osage Allottee, *Plaintiff in Error,*

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error.*

HURST, C. J. (Dissenting):

Two questions inhere in this case, (1) may Oklahoma levy an estate tax upon the transmission of property, the legal title to which is vested in the United States, and which is held in trust for the benefit of an Indian tribe, where the only right of the deceased Indian allottee is to receive his aliquot portion of the income from the trust property as the United States government may from time to time elect to distribute it in the absence of an Act of Congress authorizing such tax, and (2) did the Oklahoma Legislature intend to levy a tax upon the transmission of such right. I think both questions should be answered in the negative. We are not concerned with whether Congress should authorize such a tax to be levied, but rather whether it can be done without the consent of Congress.

1. The authorities relied upon in the majority opinion do not sustain the result reached. None of the cases relied upon involved a tax upon property held in trust by the United States for the benefit of its Indian wards. The Mountain Producers case, 303 U. S. 376, involved a tax upon the income of an oil and gas lessee of state lands, and it stands for the rule that the interest of the lessee is too remote to be protected from the levy under the rule exempting state instrumentalities from Federal taxation. The property in-

volved in the other cases relied upon was owned in fee by the individual Indians, but the alienation of such property was restricted. The Five Civilized Tribes case, 319 U. S. 598, recognizes the distinction between property owned in fee by individual Indians and property held in trust by the United States for their benefit, and cites United States *v.* Rickert, 188 U. S. 432, in making such distinction. The Rickert case has never been departed from. If, as there held, property held in trust by the United States for the Indian Allottee is not subject to state ad valorem taxation without the consent of Congress, it would seem that the State cannot levy an estate tax on its transmission by the death of the allottee, without the consent of Congress.

Our decision should be based upon sound legal principles, and not upon what we understand to be the "tone" or trend of the recent decisions of the United States Supreme Court in other tax cases not involving the precise question here involved. After all it is the function of Congress and not that of the Courts to declare the policy of the United States with reference to its Indian wards. No remote Federal instrumentality is here involved, but rather the United States Government itself. Congress has not provided a method of collecting the tax and has not authorized those having the custody of the funds held in trust to disburse them for such purposes. 25 U.S.C.A. #123 provides: "No money shall be expended from Indian tribal funds without specific appropriation by Congress." It is my view that until Congress expressly or by necessary implication authorizes the tax to be levied and collected, it cannot be done because of the implied immunity doctrine. The question of whether these headright interests are or may be taxed by the Federal Government is beside the point. The doctrine of implied immunity operates only to prevent one government from taxing the property or instrumentalities of another government, and does not prevent a government from taxing its own property or instrumentalities. 61 C. J. 361, 371; 51 Am. Jur. 279.

2. Both this court and the Federal courts are committed to the rule that the descent of property here involved is cast under the Federal statutes and not under the state statutes. See In re Pryor's Estate, — Okla. —, 181 P.

nd the cases there cited. Our estate tax statute
to cover only such property of the decedent as
by will or the intestate laws of this State." 68
1 #989. Estate and inheritance taxes are excise
nposed on the privilege of transmitting or receiv-
erty upon the death of the owner." 28 Am. Jur. 12.
61 C. J. 1592. Our Legislature did not express an
to levy an estate tax on the privilege of trans-
roperty under the laws of the United States, and
elementary that it could not constitutionally do so.
604, note 41; 28 Am. Jur. 16, 90; In re Estates of
, 83 Okla. 107, 204 P. 911, 42 A.L.R. 399; Frick
lvania, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603,
316.

e foregoing reasons, I respectfully dissent.

, J., concurs in this dissent.